No. 88-6075

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

DARRYL JAMES,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Illinois

BRIEF FOR RESPONDENT

NEIL F. HARTIGAN
Attorney General, State of Illinois
ROBERT J. RUIZ
Solicitor General, State of Illinois
TERENCE M. MADSEN *
ARLEEN C. ANDERSON
NATHAN P. MADDOX
MICHAEL J. SINGER
Assistant Attorneys General
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601
(312) 917-2235

Attorneys for Respondent

CECIL A. PARTEE
State's Attorney, County of Cook
309 Richard J. Daley Center
Chicago, Illinois 60602
(312) 443-5496
INGE FRYKLUND
SHARON JOHNSON COLEMAN
Assistant State's Attorneys

Of Counsel

* Counsel of Record

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QUESTION PRESENTED FOR REVIEW

Whether Petitioner's statements, previously suppressed on Fourth Amendment grounds, may be used to rebut the testimony of a defense witness other than the Petitioner?

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BRIEF FOR RESPONDENT

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and the persons or things to be seized.

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner, Darryl James, was convicted of the murder of Gerilia Boyd and the attempt murder of Delbert Collins. The incident occurred on the night of August 30, 1982 in Chicago, Illinois, when Petitioner and two companions demanded money from a group of eight boys.

At the pre-trial proceedings, the trial court granted a defense motion to quash Petitioner's arrest and suppress evidence stemming from the arrest. (R. 60) The evidence suppressed was Petitioner's arrest at his mother's beauty shop, where police discovered Petitioner sitting under a hair dryer with curlers in his hair. (R. 19, 20) Also suppressed were Petitioner's statements admitting he had changed his hair color from reddish-brown to black. (Supp. R. 95-96, 136-37) Petitioner's motion to suppress was granted on the grounds of lack of probable cause for arrest. (R. 57)

In their case-in-chief, the People presented the testimony of five eyewitnesses to the Boyd-Collins shootings: John Brown, Perry Brown, Kenneth Brown, Darryl Hall and Delbert Collins. According to the testimony of each of the five boys, they were walking home from a party on the night of August 30, 1982, when three boys approached them and demanded money. (R. 293, 339, 385-87, 407-08, 427-28) When no money was surrendered, one member of the trio pulled out a gun and shot into the group of boys. (R. 302) Witness John Brown described the shooter as 5 feet 4 inches tall, light-complexioned, wearing an earring and a dark brown baseball cap, and having long reddish-brown hair combed straight back. (R. 294, 300-01) The other four witnesses to the shooting corroborated John Brown's testimony. (R. 343, 391, 412, 430)

At trial each of the five eyewitnesses pointed to Petitioner and identified him as the person who shot Gerilia Boyd and Delbert Collins. The witnesses stood firm in their identification despite their acknowledgement that Petitioner's hair was black in color and natural in style at the time of trial, which was almost two years after the incident. Four of the witnesses also testified that they had seen Petitioner two weeks before the shooting incident at a parade and at the time Petitioner's hair was long, red and slicked back. (R. 294-95, 340, 388-89, 408, 429) On cross-examination of each eyewitness, defense counsel repeatedly questioned and challenged their testimony describing Petitioner as having red hair at the time of the shooting. Despite counsel's efforts, all of the witnesses remained consistent in their descriptions of Petitioner on the night of the shooting and in their in-court identifications of Petitioner as the shooter. (R. 295, 316, 355-57, 364, 388, 408, 429)

The Petitioner opted not to testify in his own behalf, but he did present Ms. Jewel Henderson, a long-time family friend, as his primary witness. (J.A. 2-3) On direct examination, Ms. Henderson's testimony contradicted the description of Petitioner given by prosecution witnesses. (J.A. 3-4) She specifically stated that Petitioner had black hair, not red, on the night of August 30, 1982.

In rebuttal, the prosecutor sought to introduce Petitioner's statement to police that sometime after the shooting on August 30, Petitioner had changed his hair color from reddish-brown to black. (Supp. R. 62) Petitioner's counsel objected to the use of the statement on the grounds that they had been suppressed under the Fourth Amendment. (Supp. R. 63-64) Nonetheless, the Court agreed to the use of Petitioner's statement to impeach Ms. Henderson's testimony that Petitioner had black hair on the night of the shooting. (R. 64) Petitioner's counsel then moved

to suppress Petitioner's statement claiming it was involuntary. (Supp. R. 115) The trial court suspended the trial, held a hearing on the motion, and then denied the motion, finding that Petitioner's statement was voluntary. (Supp. R. 128) Petitioner's statement that on August 30, 1982 his hair was reddish-brown, long and combed straight back was presented to the jury through a police detective who also testified that Petitioner had admitted that he had changed his hairstyle and hair color. (J.A. 9-11) The detective further testified that Petitioner admitted that Petitioner had gone to his mother's beauty parlor to have his hair dyed black and curled in order to change his appearance. (J.A. 9-11)

After defense counsel cross-examined the detective, the trial court orally instructed the jury that Petitioner's statements about his hair were offered to impeach Jewel Henderson and refute and rebut the witness's testimony. (J.A. 12) There was no objection made to that instruction. However, Petitioner did present two relatives in surrebuttal to testify that his hair was black on August 30th and that he had never had red hair. (Supp. R. 150-51, 154) Prior to closing argument, Petitioner offered two instructions limiting the use of Petitioner's statement to impeachment only. (J.A. 13) The trial judge refused these instructions and, instead, gave the jury a pattern instruction on the use of prior inconsistent statements. (J.A. 16)

In rebuttal closing argument, the prosecutor argued that Petitioner's statement to police that his hair was red on the day of the shooting showed that he had a guilty conscience. Defense counsel's objection to this was overruled. The prosecutor also argued to the jury that the case against Petitioner amounted to five eyewitnesses to the crime who identified Petitioner as the gunman. The prosecutor also stated that the jury had heard an admission that Petitioner changed the color of his hair. Defense counsel's objections were overruled. (J.A. 14)

The jury received its written instructions from the court and found Petitioner guilty of the murder of Gerilia Boyd and guilty of the attempt murder and aggravated battery of Delbert Collins. (Supp. R. 250)

Petitioner appealed his convictions to the Illinois Appellate Court, which reversed the convictions and remanded the case for a new trial. The Appellate Court held that the admission of Petitioner's suppressed statement to rebut the testimony of a witness other than Petitioner was improper.

The Illinois Supreme Court reversed the Appellate Court decision by holding that when the direct testimony of a defense witness "squarely contradicts" suppressed evidence, then the suppressed evidence may be admitted to rebut the testimony of that witness. In so holding the Illinois court relied on the legal principles espoused by this Court in *Walder v. United States*, 347 U.S. 62 (1954); *Harris v. New York*, 401 U.S. 222 (1971); and *United States v. Havens*, 446 U.S. 620 (1980). The State Supreme Court then affirmed Petitioner's convictions for murder and attempt murder and later denied Petitioner's request for rehearing.

SUMMARY OF THE ARGUMENT

I. The primary justification for the exclusionary rule is that it deters police misconduct that violates Fourth Amendment rights. However, experience has demonstrated that an unyielding application of the exclusionary rule often undermines the fundamental goal of our legal system—arriving at the truth—without significantly deterring police misconduct. *United States v. Havens*, 446 U.S. 620 (1980).

This Court has restricted the application of the exclusionary rule where the criminal defendant attempts to utilize the suppression of the State's evidence as a license to falsely testify. *See Walder v. United States*, 347 U.S. 62 (1954); *Harris v. New York*, 401 U.S. 222 (1971); *Oregon v. Haas*, 420 U.S. 714 (1975); *United States v. Havens*, 446 U.S. 620 (1980). The Court reasoned that the incremental furthering of the deterrent ends of the rule, by forbidding impeachment of the defendant who testifies, with its resulting impairment of the integrity of the fact-finding goals of the criminal trial, was insufficient to permit or require that false testimony pass unchallenged.

Extending the *Walder* rule to cases like the one at bar plugs a remaining hole in the exclusionary rule. In order to evade the proscriptions of *Walder, et al.*, a defendant may simply ask someone to lie for him or find someone who mistakenly believes certain facts which the defendant knows to be untrue. Just as the exclusionary rule should not be applied so as to allow a defendant to perjure himself, it should not be applied when the defendant is intentionally misrepresenting facts to the jury through other witnesses.

This restriction has inherent limitations which continue to protect the principles underlying the exclusionary rule. First, the rule is limited to impeachment of testimony that the defendant rightly controls—i.e., statements by a defense witness on direct examination. Second, the restriction arises only in cases in which the reliability of the suppressed statement is strong: i.e., the prosecution has presented sufficient corroboration of the suppressed statement, and the suppressed statement was made voluntarily.

This limited extension of *Walder* continues to serve the purposes underlying the exclusionary rule without impairing the truth-seeking function at trial.

Petitioner contends, however, that the use of his suppressed statement did not simply impeach the testimony of Jewel Henderson, but stood also as substantive proof of his guilt.

The introduction of evidence concerning an out-of-court statement to impeach an in-court statement, however, does not necessarily entail offering the statement as substantive evidence. In this case, Petitioner's statement concerning the color and style of his hair on the day of the murder impeached the veracity of Jewel Henderson for it tended to show that Ms. Henderson either erred or lied concerning the color of Petitioner's hair. This was not a substantive use of Petitioner's statement. The jury was then left to decide, in light of this information, whether Jewel Henderson was worthy of belief.

Petitioner raises issues relating to sufficiency of the jury instructions and the prosecutor's closing argument in order to prove that use of his statement could not be limited to impeachment. Any claim regarding the sufficiency of the trial court's oral limiting instruction is waived. Furthermore, the instructions given by the trial court properly limited the use of the suppressed statement. Finally, any error regarding either jury instructions or the prosecutor's argument was harmless.

II. Even if Petitioner is correct in his characterization of the use of this evidence, there is little justification for precluding the State from making substantive use of the Petitioner's prior inconsistent statement as rebuttal evidence. Indeed, the public interest in determination of the truth at trial outweighs the incremental contribution that might be made to protection of Fourth Amendment values by limiting the use of suppressed evidence to impeachment of a witness's veracity.

In this case, Petitioner chose to present testimony, through Jewel Henderson, that was contradictory to his own prior statement. Once Petitioner presented his case, including the testimony of Henderson, the State, on rebuttal, was entitled to present any evidence made necessary by the Petitioner's case in reply.

It is unrealistic to assume that application of the exclusionary rule to the prosecution's case in rebuttal would significantly further the goal of deterring police misconduct. Under these circumstances, the incentive to disregard the requirement of the Fourth Amendment, solely to obtain a statement from an accused that may later contradict testimony that he may present through a witness at trial, is negligible.

If the purpose of the exclusionary rule is to deter police misconduct, then the only justification for restricting the use of suppressed evidence to impeachment is if that restriction, in and of itself, contributes to the deterrence of unlawful police activity. Such a proposition cannot withstand the scrutiny of this Court's decision in *United States v. Leon*, 468 U.S. 897 (1984).

In this case, the trial court properly enforced the exclusionary rule to the point where the benefits of its deterrent function were no longer being furthered. The prosecution made no attempt to offer the excluded evidence in its case-in-chief. It was only at the point in the trial where it became clear that the Petitioner was attempting to take advantage of its suppression in order to pervert the truth that the trial court removed the bar of the exclusionary rule. Leon, read in conjunction with Walder, dictates that the bar of the exclusionary rule should completely fall under these circumstances, thus allowing substantive use of the previously suppressed evidence.

ARGUMENT

I.

ALLOWING THE IMPEACHMENT OF A DEFENSE WITNESS WITH THE PRIOR INCONSISTENT STATEMENT OF THE DEFENDANT IS COMPATIBLE WITH THE POLICIES UNDERLYING THE EXCLUSIONARY RULE ANNOUNCED IN *WALDER, HARRIS, HAAS* AND *HAVENS*.

Petitioner urges that the Illinois Supreme Court's decision affirming the prosecution's impeachment of a defense witness with Petitioner's previously suppressed statement improperly extended this Court's prior decisions governing the Fourth Amendment exclusionary rule. However, examination of the policies underlying the exclusionary rule and those underlying the criminal trial, as a whole, demonstrates that the Illinois Supreme Court's decision was correct.

A. The Use Of A Defendant's Suppressed Statement To Impeach A Defense Witness Comports With The Policies Underlying Established Restrictions On The Exclusionary Rule.

This Court adopted the exclusionary rule as a prophylactic device to effectuate the Fourth Amendment right of all citizens "to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures. . . ." *Weeks v. United States*, 232 U.S. 383, 389, 391-92 (1914). Under this Rule, evidence obtained in violation of the Fourth Amendment cannot be used in a criminal proceeding against the victim of the illegal search and seizure. *Mapp v. Ohio*, 367 U.S. 643 (1961).

The primary justification for the exclusionary rule is that it deters police misconduct that violates Fourth Amendment rights. *Stone v. Powell*, 428 U.S. 465, 486 (1976). However, despite the broad deterrent purpose of the exclusionary rule, this Court has never interpreted it to proscribe the introduction of illegally seized evidence in all proceedings or against all persons. Indeed, experience has demonstrated that an unyielding application of the exclusionary rule often undermines the fundamental goal of our legal system—arriving at the truth—without significantly deterring police misconduct. *United States v. Havens*, 446 U.S. 620, 625 (1980); *Stone*, 428 U.S. at 491, n.5. Thus, as is the case with any remedial device, "the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served." *United States v. Calandra*, 414 U.S. 338, 348 (1974).

In determining whether to enforce the Rule in a given context, this Court has weighed the magnitude of the deterrent effect of enforcing the Rule against the impact of its application on the truth-seeking process. In a series of cases, this Court has restricted the application of the exclusionary rule where the criminal defendant attempts to utilize the suppression of the State's evidence as a license to falsely testify. *See Walder v. United States*, 347 U.S. 62 (1954); *Harris v. New York*, 401 U.S. 222 (1971); *Oregon v. Haas*, 420 U.S. 714 (1975); *United States v. Havens*, 446 U.S. 620 (1980). The Court reasoned that the incremental furthering of the deterrent ends of the Rule, by forbidding impeachment of the defendant who testifies, with its resulting impairment of the integrity of the fact-finding goals of the criminal trial, was insufficient to permit or require that false testimony pass unchallenged. *Havens*, 446 U.S. at 627. *Walder* and its progeny hold

that the ends of the exclusionary rule are adequately implemented by denying the prosecution the use of the challenged evidence to make out its case-in-chief:

> It is one thing to say that the Government cannot make an affirmative use of evidence unlawfully obtained. It is quite another to say that the defendant can turn the illegal method by which evidence in the Government's possession was obtained to his own advantage, and provide himself with a shield against the untruths.

Walder, 347 U.S. at 65.

After *Walder*, *Harris*, *Havens* and *Haas*, a defendant could no longer take the stand and perjure himself without opening himself up to impeachment by the Government, which included the offering of previously suppressed inconsistent statements. These decisions can thus be viewed as plugging a hole in the exclusionary rule which encouraged false testimony. Such a hole undermined the truth-seeking function of the trial without increasing the deterrent function of the exclusionary rule, and, therefore, the Rule yielded in order that the policy balance could be restored.

Extending the *Walder* rule to cases like the one at bar plugs a remaining hole in the exclusionary rule. In order to evade the proscriptions of *Walder, et al.*, a defendant may simply ask someone to lie for him or find someone who mistakenly believes certain facts which the defendant knows to be untrue. In this case, for example, five prosecution witnesses identified Petitioner as the man who shot Girelia Boyd and Delbert Collins. All five also testified that on the day of the shooting, Petitioner had red hair. Petitioner's suppressed statement, which the trial court found to have been voluntarily made, concurred with the testimony of the prosecution witnesses. Petitioner knew

this, but still, of his own volition, deliberately called Jewel Henderson to testify. He knew that she would wrongly testify that he had black hair on the day of the shooting. *See Taylor v. Illinois*, 484 U.S. 400, ____, 108 S.Ct. 646, 653, 98 L.Ed.2d 798, 811 (1988) (the right to present witnesses, in order to be effectively used must be preceded by deliberate planning and affirmative conduct by the defendant). Even if Jewel Henderson believed herself to be telling the truth, Petitioner knew she was wrong and deliberately called her to testify. Petitioner also believed that the prosecution would not be allowed to offer his suppressed statement that his hair was red.

Just as the exclusionary rule should not be applied so as to allow a defendant to perjure himself, it should not be applied when the defendant is intentionally misrepresenting facts to the jury through other witnesses. *People v. James*, 123 Ill.2d 523, 536, 528 N.E.2d 723, 729 (1988); *Hendrickson v. State*, 290 Ark. 319, 719 S.W.2d 420, 424 (1986).

Respondent's proposed restriction on the exclusionary rule does not undermine the deterrent function of the Rule and, therefore, is appropriate under *Walder* and its progeny. As noted above, explicit in these cases was the caveat that the exclusionary rule remained a strong restriction against the Government's use of illegally obtained evidence in its case-in-chief. However, in weighing the goal of truth-seeking against the deterrent effect of the exclusionary rule in those cases, it was held that there was only speculative possibility that the police would be invited to act illegally to garner evidence simply on the chance the defendant might take the stand and perjure himself as to that evidence. The same is true under the present circumstances. Exclusion of the suppressed statements here simply does not efficaciously serve the re-

medial objectives of the exclusionary rule. It is simply unfathomable that police will disregard the requirements of the Fourth Amendment solely to obtain a statement from an accused that may later contradict testimony the accused may present through a witness at trial. As in *Walder*, et al., any incremental deterrent effect gained by enforcing the Rule in this kind of case is speculative. This being the case, the efficacy of the deterrent function of the exclusionary rule "reaches a point of diminishing returns" when evidence is excluded beyond the prosecution's case-in-chief where a defendant, like Darryl James in this case, attempts to perpetrate a fraud on the court. *See Stone*, 428 U.S. at 493 n.34. Beyond this, the rule provides a windfall for such a defendant and frustrates the truth-seeking function of the trial.[1]

Furthermore, Respondent's proposed restriction has inherent limitations which protect the principles underlying the exclusionary rule. First, the rule is limited to impeachment of testimony that defendant rightly controls—i.e., statements by a defense witness on direct examination. *See James*, 123 Ill. 2d at 537, 528 N.E.2d at 729. Second, the restriction arises only in cases in which the reliability of the suppressed statement is strong: i.e., the prosecution has presented sufficient evidence corroborative of the suppressed statement, and the suppressed statement was made voluntarily. In this case, as stated above, five witnesses testified that Petitioner's hair was red on the day of the shooting,[2] and the trial court found that Petitioner had voluntarily told police that his hair had been red. The evidence, thus, was sufficiently reliable to remove any concern that it had been tainted by the alleged police misconduct. Under these circumstances, the evidence was properly admitted.

[1] Extending the *Walder* restriction to cases like this one does not hinder a defendant's right and ability to present a legitimate defense. The rule suggested here does not preclude the defendant from taking the stand and denying guilt, and it allows any defense witness to take the stand and present any testimony for the defendant—so long as neither contradict the defendant's own reliable, voluntary suppressed prior statement. *See* Argument II, *infra*. Indeed, a defense witness is only restrained from testifying as to any "fact" that a defendant is likewise restrained from offering under *Walder*, et al.

B. The Prosecution Properly Impeached Jewel Henderson At Trial.

The rationale offered in Section A for restricting the exclusionary rule in cases like this is the same as that of the Illinois Supreme Court's opinion below. That court reasoned that when the defendant purposely presents a statement which so contradicts a suppressed statement as to raise a presumption that defendant was attempting to take advantage of the fact of suppression, the exclusionary rule should yield to the ultimate truth-seeking function of the criminal trial. Petitioner does not dispute the rationale of the state court decision. Rather, he contends that to use the suppressed statement of Petitioner does not simply impeach the testimony of Jewel Henderson, but stands also as substantive proof of his guilt. This argument misapplies the relevant evidentiary principles.

The core of Petitioner's argument is that it is inherently impossible to impeach one witness's testimony with evidence of an out-of-court statement made by a second witness unless the out-of-court statement is offered for the

[2] Indeed, the only time that a defendant has any incentive to take the stand and lie or to call a witness to lie is when the prosecution has presented evidence directly contrary to the suppressed statement.

truth of the matter asserted. The introduction of evidence concerning an out-of-court statement to impeach an in-court statement does not necessarily entail offering the statement as substantive evidence.[3]

In this case, Petitioner's statements concerning the color and style of his hair on the day of the murder were introduced to impeach the veracity of Jewel Henderson. The statements tended to show that Ms. Henderson either erred or lied concerning the color of Petitioner's hair. This was not a substantive use of Petitioner's statement. The statement established only that at one time, Petitioner stated his hair was red on that day. The fact that he made that statement alone tended to call into question the veracity of Jewel Henderson. The jury was then left to decide, in light of this information, whether Jewel Henderson was worthy of belief.

Petitioner, nevetheless, contends that it is inherently impossible to limit the jury's consideration of this evidence in such a manner. As proof, he offers the trial court's oral limiting instruction to the jury, which he asserts demonstrates the impossibility. This assertion is in sharp contrast with the belief of his trial counsel, who clearly recognized that the jury's use of the evidence in question could indeed be limited to impeachment and who offered instructions which he believed would accomplish that end. (Supp. R. 159-62) Respondent agrees that trial counsel's instruc-

[3] As an initial matter, however, this Court has recognized that the formulation of underlying rules of evidence is a matter of state law. *Jenkins v. Anderson*, 447 U.S. 231, 239, n.5 (1980). In Petitioner's case, the Illinois Supreme Court determined that an out-of-court statement of one witness may be used to impeach the testimony of a second witness. *James*, 123 Ill. 2d at 538-40, 528 N.E. 2d at 730-31. Therefore, as a matter of state law, Petitioner's statement impeached Jewel Henderson.

tions would have properly limited the jury. That does not mean, however, that the instructions the trial court gave to the jury were insufficient. As further proof of impossibility, Petitioner argues that the prosecutor made improper reference to the statement in his rebuttal closing argument. Petitioner does not explain, however, how an alleged error in the prosecution's argument shows that the jury's use of Petitioner's statement cannot be limited to impeachment. Moreover, if either the trial court's instructions or the prosecution's argument constituted error, by allowing the jury to consider Petitioner's statement as substantive evidence, that error was harmless.

1. Improper Jury Instruction.

After Detective Glynn testified regarding Petitioner's prior inconsistent statement, counsel for Petitioner requested the judge to instruct the jury on the purpose for which this testimony was received. The trial judge instructed the jury as follows:

> It's offered for the purpose of impeaching the testimony of Miss Henderson who stated to you that the defendant's hair was black. This evidence is offered to refute and rebut that testimony, that it was not black but it was red at the point the officer said the defendant told him it was red. (J.A. 12)

Petitioner did not object to this instruction at trial. Nonetheless, Petitioner argues that this instruction states the nature of impeachment by contradiction and illustrates that this method of impeachment requires that the contradicting evidence be used substantively. (Petitioner's Brief at 14)

To the extent that Petitioner is advancing this argument as a substantive ground for relief, his argument is of no avail. The Illinois Supreme Court held that Peti-

tioner waived any error in the oral instruction because he failed to object or to request further instruction. *James*, 123 Ill. 2d at 541, 528 N.E.2d at 730-31. "This Court long has held that it will not consider an issue of federal law on direct review from a judgment of a state court if that judgment rests on a state-law ground that is both 'independent' of the merits of the federal claim and an 'adequate' basis for the court's decision." *Harris v. Reed*, ____ U.S. ____, 109 S.Ct. 1038, 1042, 103 L.Ed.2d 308, 316 (1989); *Michigan v. Long*, 463 U.S. 1032, 1042 (1983).

To the extent that Petitioner advances this claim, not as a substantive ground for relief, but to demonstrate his theory that it is inherently impossible to limit the use of statements like Petitioner's to impeachment of a defense witness, his argument remains of no avail.

Certainly, the oral instruction, by its language, did not require that the jury believe Detective Glynn's testimony as substantive evidence. The judge clearly stated that the suppressed statement was being offered for the purpose of impeaching the testimony of Miss Henderson. While the second sentence of the instruction may be interpreted as over-emphasizing the weight which could be given to the suppressed statement, the trial judge rectified that possibility by giving the jury a written pattern instruction on the use of prior inconsistent statements:[4]

[4] Although Petitioner complains that the trial court refused the two alternative written instructions his attorney proposed, Respondent notes that the "trial court's charge to the jury need not follow the exact form and wording of the defendant's proposed instructions." *United States v. Gibson*, 726 F.2d 869, 874 (1st Cir. 1984). "It is enough that the charge adequately and correctly covers the substance of the requested instructions." 2 C. Wright, Federal Practice and Procedure § 482, at 688-89 (1982) (collecting authorities).

> The believability of a witness may be challenged by evidence that on some former occasion the witness made a statement that was not consistent with his testimony in this case and evidence of this kind may be considered by you only for the purpose of deciding the weight to be given the testimony you heard from the witnesses in this courtroom. Illinois Pattern Jury Instructions, Criminal, No. 3.11 (2d ed. 1981).

The Illinois Supreme Court correctly found that the instruction concerning the suppressed statement, in conjunction with the subsequent written instruction, properly informed the jury of the limited impeachment purpose for which Petitioner's statement could be used. *James*, 123 Ill. 2d at 539-40, 528 N.E.2d at 730-31. As this Court has stressed, "a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge." *Cupp v. Naughten*, 414 U.S. 141, 146-47 (1973).

Instructions bearing on matters such as burden of proof, the weight to be accorded different types of testimony, and other familiar subjects of jury instructions are designed to give the jury "some guidance by which to evaluate the frequently confusing and conflicting testimony which it has heard." *Naughten*, 414 U.S. at 148-49. The jury instructions in this case achieved that purpose. The well-recognized and long-established function of the trial judge to assist the jury by such instructions should not be "parsed" by such abstract nuances as Petitioner suggests here. It is unlikely that "this jury was so attentively attuned to the instructions of the trial court that it divined the difference recognized by lawyers between ['impeach'] and ['rebut']. . . ." *Sandstrom v. Montana*, 442 U.S. 510, 528 (1979) (Rehnquist, J., concurring) (original language comparing "presume" and "infer"). This is particularly likely in this case, where the instruction at issue

was an oral one, later modified and clarified by a written instruction, which clearly limited the use of prior inconsistent statements to impeachment.

Even if the trial court erred in instructing the jury, the error was harmless. *See Chapman v. California*, 386 U.S. 18, 22 (1967) (articulating standard). Harmless error analysis requires the reviewing court to discern whether it is clear beyond a reasonable doubt that, absent the error, the jury would have returned a guilty verdict. *United States v. Hasting*, 461 U.S. 499, 510-11 (1983). In this case, such an inquiry amounts to asking whether Petitioner would still have been found guilty had the trial court not included language referring to rebuttal in the oral instruction.

Five eyewitnesses, including victim Delbert Collins, identified Petitioner in-court as the person who shot Collins and Girelia Boyd on August 30, 1982. (R. 294-95, 340, 388-89, 408, 429) Furthermore, each of these witnesses recognized Petitioner from a previous occasion. The record reveals that these witnesses stood "about nine steps in front" of Petitioner when he drew his gun. (R. 302) The shooting occurred in a well-lighted area. (R. 312) All five witnesses described the shooter as a short black male, who wore an earring in his left ear. (R. 302, 343, 391, 412, 430) The most prominent feature described by all of the witnesses was Petitioner's long, reddish-brown, slicked back hair. (R. 294, 300-01, 343, 391, 412, 430) This evidence had to be weighed by the jury in light of Petitioner's case which consisted only of Jewel Henderson's testimony and that of two relatives who testified on surrebuttal that Petitioner's hair was black on the day of the shooting. The veracity of this testimony was thoroughly impeached, however, by Petitioner's own statement that his hair had been red on that day. Petitioner's hair was also black at trial,

and he had grown taller in the year and a half since the shooting. (R. 301) On this record, it is inconceivable that the jury would not have found Petitioner guilty. Therefore, any error regarding the instructions, or even the admission of the suppressed statement, was harmless beyond a reasonable doubt.

2. Closing Argument.

Petitioner further argues that the prosecution made improper references to his prior statement during its rebuttal closing argument and, thus, did not use the statement for the limited purpose of impeachment. Instead, he contends the State relied upon the statement as affirmative proof of Petitioner's guilt. (Petitioner's Brief at 16)

The Illinois Supreme Court found that the prosecutor's reference was harmless. *James*, 123 Ill. 2d at 541, 528 N.E.2d at 731. As argued above, if a reviewing court finds, beyond a reasonable doubt, that the jury would have returned a guilty verdict despite the error, the judgment should be affirmed. *Rose v. Clark*, 478 U.S. 570, 579 (1986).

As the facts reviewed in subsection 1 show, the State established Petitioner's guilt beyond a reasonable doubt, independent of any error in the prosecution's rebuttal closing argument. The prosecutor's statement was little more than a passing reference. *James*, 123 Ill. 2d at 541, 528 N.E.2d at 731. The prosecutor did not dwell upon Petitioner's statement or make it the focus of his argument. Furthermore, the jury was ultimately instructed as to the proper purpose for which the Petitioner's statement could be used. *James*, 123 Ill. 2d at 541, 528 N.E.2d at 731. In this context, any error which may have resulted from the prosecutor's reference simply does not rise to the level

of error necessary to warrant reversal of an otherwise valid conviction.

II.

THE STATE'S SUBSTANTIVE USE ON REBUTTAL OF AN ACCUSED'S PRIOR INCONSISTENT STATEMENT, OTHERWISE SUBJECT TO SUPPRESSION UNDER THE EXCLUSIONARY RULE, DOES NOT VIOLATE THE CONSTITUTION.

As discussed in Argument I, Petitioner contends that the prosecution's offering of his suppressed statement amounted to a substantive use of the evidence. The decisions in *Walder*, et al., would appear to limit the use of that evidence solely to impeach the testimony of Jewel Henderson. In fact, however, even if Petitioner is correct in his characterization of the use of this evidence, Respondent asserts that there is little justification for precluding the Government from making substantive use of the Petitioner's prior inconsistent statement as rebuttal evidence. Indeed, the public interest in determination of the truth at trial outweighs the incremental contribution that might be made to the protection of Fourth Amendment values by limiting the use of suppressed evidence to impeachment of a witness's veracity.

As stated above, the need for deterrence—the rationale for excluding illegally seized evidence—is strongest when the Government's unlawful conduct would yield substantive evidence which could be used to prove the elements of its case against an accused in a subsequent criminal prosecution. Generally, therefore, illegally secured evidence is unavailable to the Government for substantive use in its case-in-chief. *Harris v. New York*, 401 U.S. 222, 225 (1971).

In this case, the State made no attempt to introduce the tainted evidence in its case-in-chief. Furthermore, no governmental action induced the Petitioner to present the testimony he did in his case. The Petitioner's right to present the testimony of witnesses provides him with a sword that may be employed to rebut the prosecution's case. The decision whether to employ it in a particular case rests solely with the defendant.

The very nature of the right to present testimony requires that its effective use be preceded by deliberate planning and affirmative conduct on the part of the defendant. *Taylor v. Illinois*, 484 U.S. 400, ____, 108 S.Ct. 646, 653, 98 L.Ed.2d 798, 811 (1988). Here, Petitioner chose to present testimony, through Jewel Henderson, that was contradictory to his own prior statement. Once Petitioner presented his case, including the testimony of Henderson, the State, on rebuttal, was entitled to present any evidence made necessary by the Petitioner's case in reply. *See* 6 J. Wigmore, Evidence § 1873 (Chadbourn rev. 1976).

As argued above, it is unrealistic to assume that application of the exclusionary rule to the prosecution's case in rebuttal would significantly further the goal of deterring police misconduct. Under these circumstances, the incentive to disregard the requirement of the Fourth Amendment, solely to obtain a statement from an accused that may later contradict testimony he presents through a witness at trial, is negligible. The police simply cannot know beforehand what part of the State's case the defendant will dispute. Therefore, by excluding the evidence in rebuttal, a speculative and undoubtedly minimal advance in the deterrence of police misconduct is achieved at the expense of impeding the fundamental goal of arriving at the truth in criminal trials.

Indeed, if the purpose of the exclusionary rule is to deter police misconduct, then the only justification for restricting the use of suppressed evidence to impeachment is if that restriction, in and of itself, contributes to the deterrence of unlawful police activity. Such a proposition cannot withstand the scrutiny of this Court's decision in *United States v. Leon*, 468 U.S. 897 (1984).

In *Leon*, this Court refused to enforce the exclusionary rule where law enforcement officers, acting in good-faith reliance on a judicially-issued warrant which was later determined to be invalid, made an unlawful arrest or seizure of evidence. *Leon* held that the prosecution may use evidence seized under such a warrant as substantive proof of guilt in its case-in-chief. The rationale for this decision is that "the exclusionary rule is designed to deter police misconduct rather than to punish the errors of judges," and to exclude such evidence undermines the truth-seeking function of the trial without furthering the deterrent purpose of the exclusionary rule. *Id.* at 913-15.

Leon instructs that when the level of deterrence derived from exclusion is infinitely outweighed by the undermining of the truth-seeking function, the bar of the exclusionary rule falls entirely. *Walder v. United States*, 347 U.S. 65 (1954), and its progeny indicate that the level of deterrence achieved by exclusion when the police have arguably conducted themselves improperly outweighs the damage to the truth-seeking function to the extent that the prosecution should never be allowed to offer illegally secured evidence in its case-in-chief; however, the balance is lost if the defendant attempts to manipulate the trial by taking advantage of suppression to present a fabricated defense. Thus, the exclusionary rule falls in order to restore the policy balance.

Leon serves as a persuasive argument that this Court has not considered there to be some talismanic significance to the level of deterrence achieved by limiting the use of suppressed evidence to impeachment as opposed to allowing its substantive use. *Leon* makes clear that if the deterrent function of the exclusionary rule is not served, then the rule falls entirely, and the prosecution may offer the previously suppressed evidence for any purpose. The only end the exclusionary rule accomplishes in those situations is to undermine the truth-seeking function of the trial.

In this case, the trial court properly enforced the exclusionary rule to the point where the benefits of its deterrent function were no longer being furthered. The prosecution made no attempt to offer the excluded evidence in its case-in-chief. It was only at the point in the trial where it became clear that the Petitioner was attempting to take advantage of its suppression in order to pervert the truth that the trial court removed the bar of the exclusionary rule. *Walder* and its progeny hold that at that point, the deterrent effect of the exclusionary rule is negligible when compared to the undermining of the truth-seeking function. *Leon*, read in conjunction with *Walder*, dictates that the bar of the exclusionary rule should completely fall under these circumstances, thus allowing substantive use of the previously suppressed evidence.

To allow the prosecution to make substantive use of previously suppressed evidence on rebuttal does not undermine the concern this Court expressed in *Walder*, 347 U.S. at 65:

> Of course the Constitution guarantees a defendant the fullest opportunity to meet the accusation against him. He must be free to deny all the elements of the

> case against him without thereby giving leave to the Government to introduce by way of rebuttal, evidence illegally secured by it, and therefore not available for its case-in-chief.

This concern has also been expressed by several members of the Court in dissenting opinions since *Walder. Harris*, 401 U.S. at 228-30 (dissenting opinion of Justices Brennan, Marshall and Douglas ([the] accused is denied an "unfettered choice when the decision whether to take the stand is burdened by the risk that an illegally obtained prior statement may be introduced to impeach his direct testimony denying complicity in the crime charged.);[5] *Oregon v. Haas*, 420 U.S. 714, 724-25 (1975) (Brennan and Marshall, JJ., dissenting); *United States v. Havens*, 446 U.S. 620, 631 (1980) (Brennan, Marshall, Stevens and Stewart, JJ., dissenting).

A defendant is accorded "the fullest opportunity to meet the accusation against him" through the Constitution's guarantee of the right to offer the testimony of witnesses. The right to offer testimony is grounded in the Compulsory Process Clause of the Sixth Amendment which is incorporated by the Fourteenth Amendment. *Washington v. Texas*, 388 U.S. 14, 17-19 (1967). The Sixth Amendment includes a defendant's right to testify himself, should he

[5] Justice Brennan has indicated that although evidence of prior inconsistent utterances or behavior may ostensibly be offered merely to attack a defendant's credibility by contradicting his trial testimony, such evidence can also serve to buttress the affirmative elements of the prosecution's case. *Havens*, 446 U.S. at 632, n.2 (Brennan, J., et al., dissenting). "An incriminating statement is as incriminating when used to impeach credibility as it is when used as direct proof of guilt and no constitutional distinction can legitimately be drawn." *Harris*, 401 U.S. at 231 (Brennan, J., et al., dissenting); *Haas*, 420 U.S. at 724 (Brennan, J., et al., dissenting).

decide it is in his favor to do so. *Rock v. Arkansas*, 483 U.S. 44, 51 (1987).[6]

The right to present relevant testimony, however, is not without limits. The right "may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process." *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973). The integrity of the adversary process, which depends both on the presentation of reliable evidence and the rejection of unreliable evidence; the interest in the fair and efficient administration of justice; and the potential prejudice to the truth-determining function of the trial process must also weigh in the balance. *Taylor v. Illinois*, 484 U.S. 400, ____, 108 S.Ct. 646, 653, 98 L.Ed.2d 798, 811 (1988).

Accordingly, the accused does not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence. *Id.*, 484 U.S. at ____, 108 S.Ct. at 653, 98 L.Ed. 2d at 811. A defendant cannot "invoke the Sixth Amendment as a justification for presenting what might have been a half-truth." *United States v. Nobles*, 422 U.S. 225, 241 (1975). Undoubtedly, neither can one invoke the Sixth Amendment as a justification for presenting deliberately fabricated testimony. It would demean the high purpose of the Compulsory Process Clause to construe it as encompassing an absolute right to present presumptively perjured testimony to a jury.

Allowing the State to use substantively, as rebuttal evidence, an accused's prior inconsistent statement otherwise

[6] The opportunity to testify in one's own behalf is also a necessary corollary of the Fifth Amendment's guarantee against compelled testimony. *Rock v. Arkansas*, 483 U.S. at 51.

suppressible under the exclusionary rule, is not an arbitrary restriction on the accused's right to present testimony. Nor is it disproportionate to the purposes such a practice is intended to serve. In *Walder*, *Harris*, *Haas*, and *Havens*, this Court rejected the notion that the defendant's constitutional shield against having illegally seized evidence used against him could be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances. This Court should now reject any suggestion that the accused be allowed to invoke the Sixth (or Fifth) Amendment as a justification for presenting presumptively perjured testimony, with the resulting impairment of the integrity of the fact-finding goals of the criminal trial process.

CONCLUSION

For all of the foregoing reasons, Respondent, the People of the State of Illinois, respectfully request this Court to affirm the decision of the Illinois Supreme Court reinstating Petitioner's conviction and sentence.

Respectfully submitted,

NEIL F. HARTIGAN
Attorney General, State of Illinois
ROBERT J. RUIZ
Solicitor General, State of Illinois
TERENCE M. MADSEN *
ARLEEN C. ANDERSON
NATHAN P. MADDOX
MICHAEL J. SINGER
Assistant Attorneys General
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601
(312) 917-2235

Attorneys for Respondent

CECIL A. PARTEE
State's Attorney, County of Cook
309 Richard J. Daley Center
Chicago, Illinois 60602
(312) 443-5496

INGE FRYKLUND
SHARON JOHNSON COLEMAN
Assistant State's Attorneys

Of Counsel

* Counsel of Record